

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
APOLLO ENERGY CORPORATION)
Pursuant to Section 6-74-15,)
Hawaii Administrative Rules.)
_____)

DOCKET NO. 00-0135

ORDER NO. 21337

Filed Sept. 10, 2004
At 1 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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ORDER

I.

Background

On August 9, 2004, the commission issued Decision and Order No. 21227, addressing the outstanding issues that have precluded APOLLO ENERGY CORPORATION ("Apollo") and HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO") (collectively, the "Parties") from finalizing a Restated and Amended Contract ("RAC" or "RACs"). On August 23, 2004, Apollo filed a motion for clarification and reconsideration ("Motion"), in accordance with Hawaii Administrative Rules ("HAR") §§ 6-61-41 and 6-61-137.¹ On August 30, 2004, HELCO filed a memorandum in opposition to Apollo's Motion. On September 1, 2004, Apollo filed a request for leave to respond to HELCO's opposition ("request for leave"), together with said response ("Apollo's reply to HELCO's opposition").

¹Apollo's Motion is supported in part by the written declaration of its Chairman and Chief Executive Officer ("Apollo's declaration").

II.

Motion for Reconsideration

HAR chapter 6-61, subchapter 14, governs motions seeking reconsideration of a commission decision or order. A motion for reconsideration shall specifically set forth "the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous." HAR § 6-61-137. In addition, HAR §§ 6-61-139 and 6-61-140 provides:

§6-61-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

§6-61-140 Replies to motions. The commission may allow replies to a motion for rehearing or reconsideration or a stay, if it deems those replies desirable or necessary.

III.

Request for Leave

Apollo contends that pursuant to HAR § 6-61-140, "HELCO can make its reply part of the record only if the Commission allows the reply to the motion for reconsideration and if it deems such a reply to be desirable or necessary. Absent the requisite leave from the Commission to do so, the Commission should disregard HELCO's [r]eply."² Apollo also requests that

²Apollo's request for leave, at 2 - 3 (footnote and text therein omitted; underscoring in original). Apollo's use of the term "reply" in this context refers to HELCO's opposition. See Apollo's request for leave, at 1 - 2.

its reply to HELCO's opposition "be made a part of the record in this proceeding and be accorded due consideration."³

HELCO proposes certain areas of compromise that appear consistent with the commission's overall objective of attaining a final RAC through cooperation and arms-length negotiations between the Parties, without further undue delay.⁴ Moreover, HELCO provides counter-argument and other information the commission deems useful in its review of Apollo's Motion.

In this instance, the commission finds that, upon its own motion, HELCO's opposition is necessary and desirable for the efficient disposition of Apollo's Motion. HAR § 6-61-140. In addition, the commission grants Apollo's request for leave, and Apollo's reply to HELCO's opposition is made a part of the docket record.

IV.

Construction

With respect to the construction, ownership, and operation of the 3-breaker switching station ("switching station") and control building, the commission held:

The commission, in general, finds technically feasible HELCO's proposed 3-breaker system. . . . Moreover, the inclusion of a control building is consistent with HELCO's current design practice for its switching stations.

The commission also finds it reasonable for HELCO to construct, own, and operate the 3-breaker switching station and control building. The 3-breaker system, in essence, will become a

³Id. at 1.

⁴Decision and Order No. 21227, at 21, paragraph number 1.

new segment of the Kilauea-Kealia 69 kV line. In addition, HELCO's construction of the switching station and control building should curtail any issues or concerns between the Parties regarding cost overruns or unnecessary expenditures, or claims that Apollo failed to meet HELCO's specified design criteria.

Decision and Order No. 21227, at 12.

Apollo initially requests that the commission clarify and reconsider that "Apollo should be the party to construct the switching station instead of HELCO."⁵ Subsequently, in the same Motion, Apollo requests that the commission find it reasonable for Apollo to construct the switching station and control building.⁶

In support of its Motion, Apollo states:

1. Following the issuance of Decision and Order No. 21227, its lenders and principal contractor have identified new problems and concerns, "the full repercussions of which were not known at the time of the [P]arties' previous submissions and until the issuance of the [commission's decision]."⁷

2. In essence, Apollo's lenders and principal contractor express concerns to Apollo over possible delays by HELCO in meeting the project's schedule and completion dates for the construction of the switching station and control building, without any effective, timely recourse for Apollo if there are

⁵Apollo's Motion, at 3.

⁶Id. at 9. See also Apollo's reply to HELCO's opposition, at 4.

⁷Apollo's Motion, at 4 (footnote and text therein omitted). See also Apollo's declaration.

any HELCO-caused delays.⁸ Also, "the banks will not fund the project without assurance that an interconnection will be made by a date certain."⁹ Conversely, if Apollo is responsible for the construction, Apollo's principal contractor "will build the entire project . . . [and] will have specified responsibility and potential liability for [its] failure to meet project completion dates."¹⁰

3. The draft RACs provide for Apollo, its contractors, or consultants, to construct the switching station, with the Parties disagreeing on the configuration of the switching station (single- vs. 3-breaker).

4. HELCO does not take a position on who should construct the switching station and control building. Instead, HELCO's focus is on owning and operating the switching station. Conversely, Apollo has taken a definite position that it should be the entity that constructs the switching station.

HELCO opposes Apollo's request for reconsideration, stating that Apollo has failed to demonstrate that the commission's ruling on this issue is unreasonable, unlawful, or erroneous. HAR § 6-61-137.

⁸See Apollo's declaration.

⁹Apollo's Motion, at 7. See also Apollo's declaration.

¹⁰Apollo's Motion, at 7.

That said, HELCO does not object to Apollo's construction of the switching station under one (1) of two (2) alternatives:¹¹

1. HELCO's cost responsibility for the switching station is fixed at \$782,000 (\$2.194 million less \$1.412 million), with Apollo bearing the risk of cost variations, just as HELCO presently bears that risk if it constructs the switching station pursuant to Decision and Order No. 21227; or

2. HELCO's contribution is fixed at 33-1/3 per cent of the final actual cost of the switching station, with Apollo responsible for the remaining 66-2/3 per cent of the final actual cost;¹² provided that HELCO has the ability to audit the final cost of the switching station so that none of the other costs of Apollo's wind farm, for which Apollo is solely responsible, are misallocated to the cost of the switching station.

Under either proposal, HELCO states that Apollo must comply with the requirements governing the construction of the switching station, as specified in HELCO's final draft RAC.

In response, Apollo reiterates its request that the commission find it reasonable for Apollo to construct the switching station and control building. Apollo also: (1) finds troublesome HELCO's provisos and conditions, reasoning that while the commission can disregard HELCO's provisos and conditions, it

¹¹Given HELCO's use of the terms "three-breaker switching station" and "switching station," it is unclear whether HELCO also refers (by inclusion) to the control building; specifically, the construction of the control building.

¹²HELCO represents that this 2-to-1 cost allocation is consistent with Decision and Order No. 21227, page 16.

cannot; and (2) reiterates its concern that HELCO's construction of the switching station and control building "jeopardize[es] the financing and construction of the project."¹³

The construction of the switching station was initially identified as an issue by HELCO in its May 26, 2004 filing,¹⁴ and incorporated in Order No. 21020, filed on June 2, 2004 (four issues identified).

The commission's ruling that it is reasonable for HELCO to construct the switching station and control building is neither unreasonable, unlawful, nor in error. HAR § 6-61-137. As noted by the commission, "HELCO's construction of the [3-breaker] switching station and control building should curtail any issues or concerns between the Parties regarding cost overruns or unnecessary expenditures, or claims that Apollo failed to meet HELCO's specified design criteria."¹⁵

Moreover, Apollo's declaration provides new evidence in support of its position (see Section III, paragraphs 1 and 2, above) that is not part of the stipulated evidentiary record. Apollo, however, fails to explain why these newly identified problems and concerns were not previously presented or raised as part of the docket record.

Accordingly, Apollo's Motion for reconsideration of this issue is denied.

¹³Apollo's reply to HELCO's opposition, at 4.

¹⁴See HELCO's letter, dated May 26, 2004, at 2, submitting its final draft RAC to the commission.

¹⁵Decision and Order No. 21227, at 12.

The commission notes that Decision and Order No. 21227 does not preclude the Parties from agreeing to allow Apollo to construct the switching station and control building, on mutually agreeable terms. In this respect, HELCO expresses a willingness to have Apollo construct the switching station.¹⁶ Ultimately, a final resolution of this matter is subject to the Parties' arms-length negotiations.

Whomever constructs the switching station and control building, the commission stresses and reiterates that the Parties, through cooperation, should promptly and expeditiously reach agreement on a RAC. Indeed, the Parties' deadline to submit the final executed RAC to the commission is October 11, 2004. If the Parties are unable to agree on a final RAC by then, the commission fully intends to decide which Parties' version of their respective RACs best implements Order No. 21227 and the Parties' prior agreed-upon terms of the RAC. Hence, any further delays are unwarranted and unwise.

V.

True-Up

The commission apportioned the costs of the 3-breaker system (which include the cost of the control building) between the Parties, as follows:

Given the problems the 3-breaker system is designed to prevent and the benefits realized by both HELCO and Apollo, the commission believes that an apportionment of the costs between Apollo and HELCO is reasonable, as follows: (1) Apollo

¹⁶See HELCO's opposition, at 2, footnote 2.

is responsible for \$1.412 million in costs; and (2) HELCO is responsible for the remaining costs over and above \$1.412 million. This provides for an approximate two (2) to one (1) allocation of costs between the Parties. Nonetheless, the Parties, during its resumption of negotiations, are free to discuss and agree on a different apportionment.

Decision and Order No. 21227, at 16.

Apollo seeks clarification of the commission's finding that "Apollo is responsible for \$1.412 million in costs[.]" Specifically, Apollo asks "whether it is reasonable to true-up the costs so that they reflect the actual costs of a single-breaker in a three-breaker system after it has been built."¹⁷

Apollo reasons as follows:

1. Under previous versions of the draft RACs (including HELCO's final draft RAC), the Parties "are in accord that there is a truing-up process. This is designed so that neither Apollo nor HELCO will be held responsible for sums that are in excess of the total actual interconnection costs expended for interconnection."¹⁸

2. Power purchase agreements between HELCO and other independent power producers contain similar true-up provisions.

3. "If Apollo constructs the switching station in accordance with the design and specifications provided to it by HELCO for a cost less than that estimated by HELCO in its submission to the Commission, Apollo would like to have the opportunity to true-up the expense in the same way that other

¹⁷Apollo's Motion, at 9.

¹⁸Id.

interconnection expenses are trued-up."¹⁹ "Where the actual cost is known to Apollo and HELCO at the end of the construction period, likely to be some time in 2005, it would be fair and reasonable for the [P]arties not to be held to the estimated figures for a single-breaker and a three-breaker system presented to the Commission in 2004."²⁰

4. It "views the \$1.412 million in costs to be a reasonable cap on what the Commission finds Apollo's maximum contribution can be."²¹

5. "Apollo would be amenable to discussions in the renewed negotiations with HELCO on the mechanisms for truing up of the estimates for the single-breaker component of the three-breaker system."²²

6. In essence, "there should be a true up of the estimated costs for Apollo's portion of the three-breaker system."²³

In HELCO's view, Apollo seeks to modify Decision and Order No. 21227 "to state that the cost of the single-breaker component of the three-breaker switching station be 'trued up' after the actual final cost of the three-breaker switching

¹⁹Id. at 11.

²⁰Id. at 12.

²¹Id. at 11 (footnote and text therein omitted).

²²Id. at 12.

²³Id. at 13.

station is calculated."²⁴ HELCO urges the denial of Apollo's request.

HELCO asserts:

1. The cost of a single-breaker switching station has already been determined in this docket. Specifically, the commission credited HELCO's cost estimate of \$1.412 million for a single-breaker switching station.

2. "Apollo's cost share (based on the estimated cost of a one-breaker switching station) cannot be 'trued up' versus the actual cost of a one-breaker switching station, since a 3-breaker switching station (not a one-breaker switching station) will be constructed."²⁵

3. A one-way true-up in Apollo's favor is unwarranted and unfair, particularly since HELCO's estimated cost of a 3-breaker switching station was much lower than Apollo's estimate.

4. Apollo's share of \$1.412 million is a fixed amount, and is not a cap on Apollo's maximum contribution.

5. The cost for a single-breaker switching station should not be re-estimated following the installation of the 3-breaker switching station, as this will create another area of dispute. Conversely, the Parties "could agree to fix the percentage cost shares of HELCO and Apollo if either HELCO or

²⁴HELCO's opposition, at 8.

²⁵HELCO's opposition, at 2 - 3 and 9.

Apollo constructs the switching station, based on the [2-to-1 percentages], and those percentages could be applied to the actual costs."²⁶

6. The true-up mechanism in HELCO's draft RACs proposes to true-up costs in both directions, i.e., from HELCO to Apollo or from Apollo to HELCO, depending on the actual total costs incurred for interconnection. By contrast, Apollo proposes to true-up in one (1) direction only, "downward, which would decrease the amount for which Apollo is responsible."²⁷

Apollo responds that the Parties should not be held responsible "to pay more than what most accurately reflects the actual cost of construction."²⁸ In its belief, "the [P]arties can and should work out an agreeable procedure for the determination of the costs of construction of a single-breaker switching station after the three-breaker switching station has been built and the costs are known."²⁹ "Real numbers and actual conditions will form the basis for more accurate cost assignments during a true-up of the switching station, as they do for other interconnection costs."³⁰

Apollo also intimates that if a true-up results in more than the sums specified in Decision and Order No. 21227,

²⁶HELCO's opposition, at 3.

²⁷HELCO's opposition, at 9.

²⁸Apollo's reply to HELCO's opposition, at 5.

²⁹Id.

³⁰Id. at 5 - 6 (footnote and text therein omitted).

"then both [P]arties should be willing to step up and pay them. Of course, HELCO would likewise be required to recognize this principle."³¹

At the outset, the commission notes that: (1) the true-up process was not identified as an issue by Apollo or the commission during the pre-briefing process;³² and (2) Apollo's request on this issue is one for clarification and not reconsideration. Indeed, Apollo does not allege that the commission's ruling that "Apollo is responsible for \$1.412 million in costs" is unreasonable, unlawful, or erroneous. HAR § 6-61-137.

The stipulated evidentiary record includes the Parties' cost estimates of single-breaker (HELCO) and 3-breaker systems (HELCO and Apollo). The commission credited HELCO's cost estimates for single-breaker (\$1.412 million) and 3-breaker systems (\$2.194 million).

The commission clearly held that Apollo is responsible for \$1.412 million in costs, and HELCO is responsible for the remaining costs over and above \$1.412 million. Accordingly, the commission denies as unnecessary Apollo's request for clarification.

³¹See id. at 5 - 6, footnote 4.

³²See, e.g., Apollo's motion for expedited ruling, filed on March 18, 2004; and Order No. 21020.

VI.

Orders

THE COMMISSION ORDERS:

1. HELCO's memorandum in opposition, filed on August 30, 2004, is accepted and made a part of the docket record.

2. Apollo's request for leave to respond, filed on September 1, 2004, is granted. Apollo's reply to HELCO's opposition is made a part of the docket record.

3. Apollo's motion for clarification and reconsideration, filed on August 23, 2004, is denied.

DONE at Honolulu, Hawaii SEP 10 2004.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By Wayne H. Kimura
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Michael Azama
for Michael Azama
Commission Counsel

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 21337 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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